

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF:)

K. C.)

Petitioner,)

Vs.)

No. 04-04

WILLIAMSON COUNTY SCHOOLS)

Respondent)

OFFICE OF LEGAL SERVICES

JUL 09 2004

DIVISION OF
SPECIAL EDUCATION

FINAL ORDER

Administrative Law Judge:

Howard W. Wilson
6 Public Square N.
Murfreesboro, Tennessee 37130

Attorney for Petitioner:

Ms. Marcella Fletcher
Attorney at Law
17 Brentshire Square, A-2
P.O. Box 12556
Jackson, TN 38308

Attorney for Respondent:

Ms. Deborah Smith
Attorney at Law
201 4th Ave., N. Suite 1500
Nashville, TN. 37219

{NOTE: To protect the confidentiality of the minor student, she will be referred to hereafter as "KC"}

FINAL ORDER
04-04

I. Findings of Facts

This matter was heard on May 14, 2004 at the Williamson County Board of Education. KC is a school age child with a disability who is eligible for special education and related services pursuant to the IDEA. Her primary disability is Hearing Impaired. KC is entitled to a Free Appropriate Public Education (FAPE) from Williamson County Schools. For the 2003-2004 school year, KC was in the third grade and attended Grassland Elementary School.

The Settlement Agreement from a previously requested Due Process Hearing is very specific in that a total of seventy-two (72) hours of instruction by a qualified special education, provided one hour per day after schools two days per week during the 2003-2004 academic year, the time and location of which is to be determined by mutual agreement. (TR. 59-60, Ex. 16) These compensatory educational services for the 2003-2004 school year should have started August 11, 2003, when school started.

The parent of KC sent an e-mail requesting services on August 19th to Nancy Medlin, Coordinator of Special Education services for the school district. (TR. 27). She received a response from Ms. Medlin, dated September 3, 2004 (Ex. 1). Ms. Medlin stated in this e-mail that she had arranged for services to be provided and she would be starting on September 8, 2003. In this letter Ms Medlin states, "You may also call Heidi at Walnut Grove Elementary School, as she will be glad to answer any questions." The

Parent called Heidi and learned that these services were not going to be provided. (TR. 31).

The Williamson County school system offered to provide KC with compensatory services to begin on September 8, 2003, for two days per week, an hour per session. (Ex. 17)

On September 9, 2003, the parent, her educational consultant and Ms. Medlin discussed compensatory services and Ms. Medlin assured the parent that she was still trying to put together a program. (TR.109).

Mrs. Medlin stated that one of the two teachers, Ms. Mary Louise Murphy, was present on several occasions to provide the compensatory services but she could be sure when that was and the teacher was not paid for showing up. (TR. 118-9).

KC's mother was told by one of the two teachers that she was suddenly unable to provide the September services. (TR. 63, 117). Further the other teacher subsequently became unavailable to provide the services in September (TR 111).

Mrs. Bolton, educational consultant testified that KC "needs constant repetition, needs the academics presented to her multiple different ways throughout the day and that it's consistently used," and other wise needs "maintenance of those skills or she does appear to lose them." (TR 91).

The parent was concerned that services were not going to be offered and she asked the school board attorney, Mr. Rob Wheeler, how to settle the disagreement. The school board attorney told the parent, she would have to file for a Due Process Hearing. (TR. 50) He stated that there would be no settlement, no more discussion, that if we wanted it settled, we had to file Due Process. (TR. 68)

KC's mother testified that she had contracted with Ms. Tracey Bolton, KC's private tutor, on October 24, 2003. (TR 66, Ex. 22). She had contracted with the private tutor before her attorney sent a letter to Dr. Dallas Johnson, Superintendent of Schools, on October 28, 2003 regarding the issues and the lack of services for the previous 12 weeks. (Ex. 18). Ms. Bolton charges \$45.00 per hour. (TR 76). Ms. Bolton testified that KC has made "tremendous progress". (TR 78). An expressed concern of both the parent and the tutor was that KC needed consistency with her tutor. Multiple personalities attempting to provide continuity would not have been in the best interest of KC. (TR. 113).

Parent's attorney notified the school district on October 28, 2003 of the lack of services the District had agreed to and were failing to provide. Soon thereafter, the district notified the parent that services had finally been arranged and could begin. One of teachers, slated to provide the compensatory services after the October 28th attorney's letter stated she was contacted on the same date to provide the services. (TR. 147).

KC's parent notified the school district that an appointment for her daughter to receive her audiogram had been set up for November 12, 2003, as it was more than six months past due according to her IEP. (Ex. 6, p. 32). The parent also advised that he would expect the school system to pay these expenses. Ms. Medlin admits to failing to follow through on the IEP to provide the audiogram. (TR. 121)

Nancy Medlin, Coordinator of Special Education services sent a response letter three days later after receipt of the attorney's letter, stating a schedule had been arranged for services to begin on November 6, 2003. (TR. 143, 159 Ex.: 16)

KC filed for a due process hearing on November 11, 2003 as a result of the disagreement regarding the timeliness of services under the Settlement Agreement and the failure to provide other related services in the student's IEP in a timely matter resulting in a denial of FAPE. (Ex. 21)

The school district failed to fill in their part of the form for a Due Process Hearing and send it to the State Department of Education. When the Parents requested a status report from the School's attorney, it was learned that the school district had not sent the form as required. The Parents did not waive the time requirement. It took the School District more than seventy-nine (79) days to send in the form to the State Department of Education. (TR. 52-54)

In a letter dated November 3, 2003, the parents rejected the offer of services from the school district as an inadequate and belated attempt to provide compensatory education (Ex: 20)

II. Issues

1. Whether or not the 12-week delay in implementing the Settlement Agreement denied KC a Free Appropriate Public Education.
2. Whether or not the school's delay in submitting the Petitioner's due process hearing request constituted a procedural violation that substantially harmed the child.

III. Legal Standards

The Individuals with Disabilities Education Act defines "special education and related services" as that (a) are provided at public expense and under public supervision

and direction: (b) meet the standards of the state educational agency; (c) include an appropriate preschool, elementary, or secondary school education; and (d) are provided in conformity with a properly developed IEP. 20 USC 1401; 34 CFR 300.13.

The primary vehicle in making sure that a child receives a free appropriate public education (FAPE) is the development of an individualized education program (IEP). The process of the IEP involves (1) determining what level the student is functioning; (2) setting an annual goal for progress; (3) establishing short term objectives to monitor progress; (4) deciding what related services are necessary; and (5) determining the type of classroom in which an IEP is implemented. IDEA defines FAPE as well. In Babb v. Knox County Sch. Sys., 965 F.2d 104, 108-9 (6th Cir. 1992), the Sixth Circuit states:

The Act defines a free appropriate public education as “special education and related services.” 20 USC 1401(18). Special education is defined as “specially designed instruction, at no cost to parents or guardians. . . instruction in hospitals and institutions.” 20 USC 1401(16). The Act defines “Related Services at 20 USC 1401(17), as transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a disabled child to benefit from special education, and includes early identification and assessment of disabling conditions in children.

Because the IEP is the centerpiece of the IDEA, the IEP must not be taken lightly. See 34 CFR 300.347. The Sixth Circuit emphasizes the importance of complying with the procedural requirements of IDEA in Knable v. Bexley City School District, 238 F.3d 755, 763 (6th Cir. 2001). The Sixth Circuit states:

When Parents challenge the appropriateness of a program or placement offered to their disabled child by a school district under IDEA, a reviewing court must undertake a two-fold inquiry. See Bd. of Educ. v.

Rowley, 458 U.S. 16, 206-7 (1982). First, the court must ask whether the school district has complied with the procedures set forth in the IDEA. Second, the court must determine whether the IEP, developed through the IDEA procedures, is reasonably calculated to enable the child to receive educational benefits. The Court defined the term appropriate in terms of educational benefit: "Implicit in the Congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education be sufficient to confer some educational benefit upon the handicapped child." The Court also found that Congress placed as much emphasis on compliance with the Act's procedural requirements as it did upon the measurement of the resulting IEP against substantive standard. There is no violation of the IDEA so long as the school district has satisfied both requirements.

If the procedural violations have resulted in substantial harm to the student or his parents, relief should be granted. Metro. Bd. Of Public Educ. V. Guest, 193 F.3d 457, 464-65 (6th Cir. 1999). When Parents are denied the most fundamental rights of IDEA by a School District, the result is a denial of FAPE. Failure to provide parents a Due Process Hearing in a timely manner as required by IDEA and Tennessee law is a *per se* violation of the Act. IDEA sets out the timeliness requirement in 34 CFR 300.511. It states:

Timelines and convenience of hearings and reviews.

- (a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing –
 - (1) A final decision is reached in the hearing; and
 - (2) A copy of the decision is reached in the hearing.
- (c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.
- (d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

Procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of

FAPE under IDEA. See Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6th Cir. 1992); W.G., 960 F.2d at 1984. Knable v. Bexley City School District, 238 F.3d 755, 765-66 (6th Cir. 2001). The parents right to a Due Process Hearing is the heart of the procedural rights afforded parents through IDEA. In Blackman v. District of Columbia, 277 F. Supp. 71, 78-79 (D.C. 2003) students were denied a timely Due Process Hearing. The District Court held:

The Special Master concluded that DCPS's failure to provide timely due process hearings constitute irreparable harm to plaintiffs because the right to a hearing "is absolute, and the failure to provide a timely hearing has consequences that are absolute – that is, there is no substitute available to the student and his or her family. It is the absolute lack of an alternative to the student that causes irreparable harm" at the hands of DCPS." DeVrijer Rep. At 5-6. Defendants counter that because the timely provision of due process hearing is a procedural protection provided in the IDEA, plaintiffs must demonstrate that actual harm or prejudice resulted from the denial of a hearing in order to merit injunctive relief. In the absence of such harm, the failure to provide a hearing may be remedied by directing that such a hearing promptly be held. See Defs.' Jetter Obj. at 4.

Defendants' failure to provide a timely due process hearing to plaintiffs is not an unimportant or technical violation of procedural safeguards provided for in the IDEA. Rather, it is the denial of a fundamental component of the due process protections afforded by the statute. As the Supreme Court noted in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982), the procedural due process protections included by Congress in the IDEA are of critical importance to effectuating the goals of the statute:

When the elaborate and highly specific procedural safeguards embodied in section 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g. 1415(a)-(d), as it did upon the measurement of the resulting IEP against substantive standards. We think that the Congressional emphasis upon full participation of concerned parties through the development of the IEP, as well as the requirements that state and local plans submitted to the Secretary for approval, demonstrates, the legislative conviction that adequate compliance with the

procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Federal courts have interpreted a FAPE to mean an IEP and services that provide “significant learning” and confer “meaningful benefit” on the student via “personalized instruction with sufficient support services to permit the child to benefit educationally.” Hendrick Hudson Bd. of Education v. Rowley, 458 U.S. 176, 188-89, 203 (1992). The IEP must be tailored to the unique needs of the disabled child, and must be reasonably calculated to provide effective results in the educational and personal skills identified as special needs. 34 CFR 300.300(3)(iii).

Administrative Law Judges are authorized to award tuition reimbursement in appropriate cases. 34 CFR 300.403(c). In Burr v. Ambach, 1988-89 EHLR 441:314 (2nd Cir, 1988), reaff’d, 16 EHLR 151 (2nd Cir, 1989), the Second Circuit Court of Appeals held that compensatory education was appropriate in certain cases. Compensatory educational services has routinely been awarded to students whose rights have been violated. See, e.g. East Penn Sch. Dist. v. Scott B., 29 IDELR 1058 (E. D. Pa. 1999).

In cases brought under the IDEA, courts are empowered to “grant the relief that the court determines to be appropriate.” 34 CFR 300.512(b)(3). Courts have the authority to fashion a broad range of equitable remedies under the IDEA. Burlington Sch. Comm. v. Massachusetts Dep’t of Education, 1984-85 EHLR 556”389 (1985).

Compensatory education is generally defined as educational services above and beyond that normally due a student under his state’s education law. While compensatory education is not a remedy expressly identified in the IDEA, courts have awarded it in appropriate circumstances by exercising their authority under 20 USC 1415(i)(2)(B)(ii).

Compensatory education may be an appropriate remedy when a student has been denied FAPE in the past. The Sixth Circuit Court of Appeals recognized compensatory education as an appropriate relief to be granted by courts. (Hall v. Knott County Board Of Education, 18 IDELR 192 (6th Cir. 1991). Also the First, Second, Third, Eighth and Ninth Circuit Courts of Appeal have also awarded compensatory services. Compensatory education may be appropriate to make up periods when a student has been inappropriately denied services. Tutoring is one excellent way of providing compensatory services.

IV. Conclusions

While not an issue that has been identified by either party, but discussed at length, the Court now puts to rest whether this Court has jurisdiction over these matters through the IDEA. The school system has argued in their briefs that the Settlement Agreement is not covered under IDEA, yet the Settlement Agreement arose from a disagreement regarding a previous IEP and was originally begun by a Due Process Hearing under IDEA. The parents main concern that the Settlement Agreement not be part of the 2003-2004 IEP was that the hours set forth in the Agreement would be consumed by the hours already listed in the 2003-2004 IEP. This would lead to a hollow victory for the parents and no additional services for their child. When the Settlement Agreement was not implemented as stated, the attorney for the school district, told the parent to request a Due Process Hearing under the IDEA. The parents accepted the advice of the school district's attorney and filed with the Superintendent of Schools a request for a Due Process Hearing. The school district was extremely delinquent in filing the present Due Process

Hearing request, however the District eventually did file the request, placing the school system squarely under the IDEA procedures. If the District felt the Settlement Agreement existed totally and apart from IDEA and its regulations, the District could have requested the Hearing be removed to another forum. The school district should have known from the beginning that the Settlement Agreement should have been a part of the 2003-2004 IEP process. The IEP could have had a special section setting forth more plainly the terms of the Settlement Agreement and established a method of ensuring the parent's concerns that the 72 hours of compensatory education was over and beyond what was being offered by the school district in the other remaining parts of the 2003-2004 IEP. The school district should have had superior knowledge or should have asked for technical assistance from the State Department of Education if it were unsure of how to incorporate Mediation Agreements, Final Orders of an Administrative Law Judge or Settlement Agreements into a student's IEP. The Settlement Agreement was established because the District had failed to provide FAPE. To say the Agreement did not fall under IDEA has absolutely no legal authority. To the contrary, the school district is to develop an IEP that allows a FAPE for a child with a disability, provided for by teachers trained in special education, and in the least restrictive environment. To argue that the very plan to provide compensatory services for failed FAPE services is not part of special education has no foundations in the law.

The central issue involves the school system's alleged delay in adhering to the provisions set forth in the 2003 Settlement Agreement. The parents acted in good faith when they signed the Settlement Agreement instead of going through with a Due Process Hearing. The parents relied on the expertise of the school district to provide the services

without holding an IEP meeting. The school district wrote in the Settlement Agreement, the district would provide services each week. The District failed to provide these services each week as promised. The school system admitted that finalization of the services did not occur immediately after the inception of the school year. After many weeks, the parents lost faith that the district would provide the services and went out and secured the services for their child. The parents operated in the best interest of their child when the district failed to meet their end of the Settlement Agreement. When asked how to force the implementation of the Settlement Agreement, an attorney for the District told the parent to request a Due Process Hearing.

Mrs. Bolton testified of the tremendous need for services to be consistent and continuous. This the District failed to carry out through compensatory services. KC has met her burden of proof to demonstrate that the delay in the provision of the Settlement Agreement services has denied her with a FAPE or otherwise hindered her progress.

It is undisputed that the IDEA imposes procedural requirements; additionally, it is undisputed that school district that violates a student's procedural rights under federal or state may be liable for compensatory services where procedural inadequacies caused substantive harm to the student, which here constituted a denial of the student's right to FAPE. See, e.g. Knable v. Bexley City School District, 238 F.3d 755, 764 (6th Cir. 2001). On the other hand, technical or *de minimis* violations that do not harm the parents or cause the student substantive harm by depriving the child of a FAPE do not entitle parents to compensatory relief. See Daughtery v. Hamilton County Schools, 25??? F. Sup. 2d 765, 772 (E.D. Tenn. 1997). KC has met her burden of proof demonstrating how the school system's delay in filing her petition for a due process request has substantially

harmed her. Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990) (citing Tatro v. Texas, 703 F.2d 823, 830 (5th Circ. 1983), *aff'd* in part and *rev'd* in part sub nom, Irving Indep. School District. v. Tatro, 468 U.S. 833 (1984) (stating that “because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing where the educational setting established by the IEP is not appropriate”))

The school district agreed to provide KC with 72 hours of compensatory education with a qualified special education teacher as a result of a denial of FAPE in a previous time frame. This ten-year-old child who has multiple disabilities including a hearing impairment needs to have services provided at this critical learning stage in her life. The School District failed to provide these services in a timely manner. After failed attempts to get this done, the Parents were forced to make sure the services were provided. Further, the school district failed to implement the IEP in a timely manner as to audiograms. Failure to perform an audiogram as a related service in a timely manner, itself, is a substantive violation. The parents were forced to have the audiogram completed themselves and then asked the school district to reimburse them. The intent of a FAPE was that the school district pay for the services and not require the parent to ask for reimbursement. This court finds absolutely no excuse for the lack of timeliness in providing compensatory services or the related services described in KC’s IEP.

The substantial delay (over 75 days) by the school district in filing the due process request is a violation that goes well beyond a technical violation. A Due Process Hearing is central to the procedural safeguards of the IDEA. For a District to argue that it is a mere violation and that nothing of substantive happened is to misunderstand the very

principles of due process as perceived in the IDEA. The entire process is to take 45 days and for the district to sit on the request for 79 days propels the violation into the realm of the ridiculous. The parents have a solid foundation for their distrust of the ability of the school district to provide even the most simple of services (forwarding a Due Process Hearing request to the State Department of Education). Further the distrust also manifests in that the District had previously failed to provide FAPE to KC and those violations resulted in a request for a due process hearing, which ended in the 2003 Settlement Agreement. Thus when the school district failed to establish a workable plan to provide the provision of FAPE for their child as indicated in the 2003 Settlement Agreement, it naturally follows the parents would be distrustful of a lengthy delay of services and felt they were forced to acquire services for KC since the school district failed once again.

A whole series of mistakes, lack of communication, lack of action to schedule services as stated in the 2003-2004 Settlement Agreement, failure to submit the Due Process Hearing request in a timely manner, failure to take seriously the timelines of the Settlement Agreement, former violations of FAPE by the school district leading to the first request for a Due Process Hearing, all leads this court to find that the District has a history of failure to implement the IDEA, both the substantive parts as well as the procedural parts for KC.

This school district has failed to act in a timely manner in all accounts that are in dispute. The Parents were forced to secure appropriate services to provide compensatory education for their child. The school district now has the duty to pay for these services for their failure to provide for them. The teacher hired by the parent is a qualified special

education teacher with a Master's of Education from Vanderbilt University. The teacher charges \$45.00, which is an appropriate rate of pay. The total cost of the compensatory education of seventy-two hours is \$3,240.00

V. ORDER

1. It is **HEREBY ORDERED** an IEP Team will convene within 15 days of this Order and add to the existing IEP for KC an additional 36 hours of compensatory time, over and beyond services already listed in the IEP, to be provided by the present private provider. Williamson County Schools will make regular and timely payments at \$45.00 per hour, to the provider upon presentment of invoices. The beginning date for these new compensatory services will be the first week of school and shall continue for the next 18 weeks at 2 sessions per week of one hour each.
2. It is **FURTHER ORDERED** Williamson County Schools shall in the future complete or cause to have completed audiograms in a timely fashion as determined by future IEP Teams.
3. It is **FURTHER ORDERED** the seventy-two hours of compensatory services provided by Mrs. Bolton at \$45.00 per hour for a total of \$3,240.00 shall be reimbursed to the parents by Williamson County School System.
4. It is **FURTHER ORDERED** the parents are the prevailing party in all issues and matters in this Due Process Hearing.

THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED. Any party aggrieved by the findings and decision may appeal to the Williamson County Chancery Court of the State of Tennessee, or may seek review in the United States District Court for Tennessee. Such an appeal must be taken within sixty (60) days of the entry of final order. In appropriate cases, the reviewing Court may direct that this Final Order be stayed.

ENTERED this the 24th day of June, 2004.



Howard W. Wilson
Administrative Law Judge
6 Public Square N.
Murfreesboro, TN 37130
(615) 895-0030

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the 24th day of June, 2004 to: counsel for the school system; counsel for the parents; and the Division of Special Education, State Department of Education, Nashville, Tennessee 37243-0375.



Howard W. Wilson